IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 1019 OF 2005

Ejaz Sayed Mohammad Sharif Pathan ...Applicant

Versus

The Union of India & Anr. ...Respondents

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Mr. Ayaz Khan, Advocate for the Applicant

Mr. R.F. Lambay, Advocate for respondent No.1.

Mr. S.R. Shinde, A.P.P. for State.

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CORAM: SMT. V.K. TAHILRAMANI, J.

DATED OF RESERVING THE ORDER : 30TH JUNE, 2005

DATE OF PRONOUNCING THE ORDER : 14TH JULY, 2005

P. C.:-

1. Heard the learned advocate for the applicant i.e. original accused in N.D.P.S. Case No. 46 of 2004. The said case is pending before the Special Judge for N.D.P.S. Cases, Greater Bombay. The applicant is seeking discharge in the said case

2. Brief facts of the said case are that on 7.2.2001, the Officer of D.R.I. seized Methaqualone. At that time one Naushad Ali accused No.1 in N.D.P.S. Case No. 45 of 2001 was present. Thereafter, two accused persons came to be arrested in the said case

i.e. the accused No.2 Muthudas and accused No.3 Haiderali. Their statements came to be recorded which were later retracted by them. These two accused persons have stated that they were in contact with one Ejaz Pathan on telephone and the consignment came to be transported on the instructions and as per the telephonic directions of Mr. Ejaz Pathan. On completion of investigation, a complaint came to be filed against the three accused persons on 27.4.2001. The said case was numbered as N.D.P.S. Case No. 45 of 2001. In the said case charges came to be framed in the month of April, 2003 and evidence commenced in the same month. Thereafter, the D.R.I. learnt that the applicant could be the person referred to in the statement of accused Nos. 2 and 3, hence, a separate case came to be filed in respect of the present applicant i.e. N.D.P.S. Case No. 46 of 2004.

3. The learned advocate for the applicant has raised two contentions. The first contention is that there is no material against the applicant except two retracted statements of two co-accused. Moreover, these accused persons and the applicant are not being tried in the same trial, hence, the statements made by those accused persons cannot be relied upon to convict the present applicant.

4. Mr. Lambay on the other hand contended that the

conviction of an accused can be based on the confessional statements of co-accused. He has placed reliance on the decision of the Supreme Court in the case of **Prabhakar Hiraman Jathar Vs. State of Maharashtra & Anr in Criminal Appeal No. 157 of 2003 decided on 24.9.2003**. Mr. Lambay, has submitted that in the said case the Supreme Court has upheld the conviction of an accused only on the basis of statements of two other co-accused, However, in my view, this decision would be of no help to the prosecution because in the case of Prabhakar Jathar, the appellant therein was tried alongwith the other two co-accused on the basis of whose statement he came to be convicted. The situation in the present case is entirely different. The co-accused and the present applicant are not being tried in the same trial. As per Section 30 of the Evidence Act a confession of a co-accused can be taken into consideration against another accused only when they are being jointly tried for the offence. So also there is no provision in the N.D.P.S. Act for taking confession of co-accused into consideration against another co-accused who is not being tried in the same trial. Admittedly, the present applicant is not being tried with the other co-accused who have allegedly implicated him. Hence, in my view, the statement of those two accused persons who are being tried separately cannot be relied upon in the trial

of the present applicant to convict him in the present case. Thus, in my view, the statements of the co-accused cannot be relied upon.

5. Thereafter, it was submitted by Mr. Lambay that the accused Nos. 2 and 3 who have implicated the present applicant, would be examined as witnesses in the case in which the applicant is being tried. In respect of this contention, useful reference may be made to the decision of the Supreme Court in the case of **Suresh @ Pappu Kalani Vs. State of Maharashtra 1998 SCC (Cri.) 1625.** In the said case confession of the accused were sought to be used against another accused who was being tried in another case. The Supreme Court held that the Court is not justified in taking into account such confession in framing charges against the co-accused on the ground that the prosecution could examine the accused as witnesses for establishing the facts disclosed in his confession. From various decisions of the Supreme Court, it is clear that the confession of an accused cannot be used against another accused if they are not tried together. Looking to the settled legal position, I am of the view that the statement of other two accused cannot be relied upon to convict the present applicant.

6. The second contention of Mr. Ayaz Khan is that

in the present case the complaint came to be filed after completion of investigation on 15.4.2004. However, there is no material in the present case to show that Ejaz Pathan referred to by accused Muthudas and Haider Ali/ Naushad Ali is the same person as the present applicant. It is to be noted that the other accused persons have not stated anywhere that the present applicant is the very same Ejaz Pathan. On going through the material on record, I find some merit in this contention.

7. Looking to all these aspects, I am of the opinion that there is no sufficient material to proceed against the applicant. In the result, the present application is allowed in terms of the prayer clause (b).

Sd/-

(SMT. V. K. TAHILRAMANI, J.)

Date: 15.7.2005

. Not on board. Taken on board.

. At this stage, the learned counsel for the respondent-D.R.I. prays that this order be stayed for a period of eight weeks as they wish to challenge the same before the Supreme Court. Mr. Khan, the

learned advocate for the applicant-accused has opposed grant of stay. It is an admitted fact that the applicant is in jail in some other matter and he is not likely to be released in near future. Hence, looking to the fact that the respondent wishes to challenge this order before the Supreme Court, I am inclined to grant stay for a period of eight weeks.

. In view of the above, this order is stayed for a period of eight weeks.

. Certified copy is expedited.

. Office to issue an authenticated copy of this order to the parties.

Sd/-

(SMT. V.K. TAHILRAMANI, J.)